BEFORE

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

DOCKET NO. 2001-411-E - ORDER NO. 2002-377

MAY 17, 2002

IN RE: Application of Greenville County Power, LLC for a Certificate of Environmental Compatibility and Public Convenience and Necessity to Construct and Operate a Generating Plant for the Production of Electric Power and Energy near Fork Shoals in Greenville County, South Carolina.	)))))))	ORDER DENYING PETITION FOR REHEARING OR RECONSIDERATION

This matter comes before the Public Service Commission of South Carolina (the Commission) on the Petition for Rehearing or Reconsideration of Greenville County Power, LLC (Greenville County Power or the Company) of Commission Order No. 2002-120. Because of the reasoning stated below, the Petition is denied.

First, the Company alleges that the Commission's ruling is unsupported by the evidence. With regard to air quality effects, the Petition correctly states that Department of Health and Environmental Control (DHEC) witness Kevin Clark testified that he had received certain additional information on nitrogen oxide control technology levels since his prefiled testimony was prepared, and that the late-filed exhibit described the modeling analysis. However, the late-filed exhibit, while providing some information, certainly does not provide or point to the definitive results espoused by the Company, i.e. that Greenville County Power meets or exceeds every air quality regulation imposed by the Environmental Protection Agency (EPA) or DHEC. See Petition at 5. In fact, the Malcolm Pirnie study describes a limitation in the modeling analysis of the firing of No.

2 distillate fuel oil in all three combustion turbines to the seasonal winter months (December 1st –February 15th), with a further imposed restriction of the use of No. 2 distillate fuel oil within that time frame to 720 hours/year. See Hearing Exhibit 21. Such restrictions show that the facility is certainly less than perfect from the air quality perspective. Further, the Company points to no testimony by Clark that supports its conclusion. We discern no error.

Certainly, in view of the Federal Court's ruling on the eight hour standard for ozone, it is clear that Greenville County is likely to be declared an ozone non-attainment area when the Environmental Protection Agency issues an eight hour standard for ozone. Company witness Neff states that this declaration of non-attainment will occur regardless of whether Greenville County Power builds its facility in Greenville County or not, since monitoring data collected to date already shows that Greenville County will not meet the proposed standard. Although we agree that non-attainment will certainly occur whether this plant is built or not (Tr., Vol. II, Neff at 468), we question whether it is wise to certificate this plant for construction, when it will almost certainly make ozone levels worse in a non-attainment area. Although DHEC certainly has the last word on this matter through its permitting process, we believe that it further buttresses our original conclusion that we cannot make a finding that the impact of the facility upon the environment is justified, considering the state of available technology and the nature and economics of the various alternatives and other pertinent considerations, notwithstanding the testimony of Company witnesses Neff and Thomas Devine.

Although Devine purportedly did an independent review of the work done by Cogentrix with regard to air quality issues, we found the testimony of Devine lacking in credibility. Devine repeatedly went outside his written prefiled testimony in his oral presentation at the hearing, even after being instructed repeatedly to stay within the parameters of his prefiled material. Thus, no party had the opportunity to investigate many of his allegations in advance of the hearing, as may normally be done. Further, he could not seem to reconcile corrections to his testimony that he wanted to make between the copy of testimony that he had on the stand and the copies that everyone else had. Third, even though Devine presented testimony marked "rebuttal" testimony, he could not initially identify whose direct testimony he was rebutting, until an answer was suggested by his counsel. This difficulty even generated a rare Motion to Strike from our General Counsel, although this was later withdrawn. The sum total of all of this confusion on the part of the witness is that we hold that his testimony was not credible, and we will therefore not afford it any weight.

With regard to water quality, the Company takes issue with the Commission's finding that the absence of any specific study gauging the effect and impact of removal of wastewater from the Reedy River precluded a determination that the impact of the facility upon the environment is justified. Again, there is no error. It is undisputed that there is no specific study gauging the effect and impact on the environment of the removal of wastewater from the Reedy River, the other testimony in the hearing notwithstanding. See Tr., Vol. III, Hargett at 744-798. Further, it is of questionable significance that, according to the Company, "in about five years," increased growth in Greenville County

would offset any loss of flow to the Reedy River as a result of Greenville County Power's use of the wastewater, and that this would allegedly have an additional benefit to Western Carolina ratepayers. What happens to the Reedy River over the next five years? No one can say for sure, which is the reason that we made our original finding. Quite simply, no study has been done, which is troubling. We would note that this Commission sits as the trier of facts, akin to a jury of experts. Hamm v. Public Service Commission, 309 S.C. 282, 422 S.E. 2d 110 (1992). Further, the weight and credibility assigned to evidence presented is a matter peculiarly within the province of the Public Service Commission. South Carolina Cable TV v. Southern Bell and the Public Service Commission, 308 S.C. 216, 417 S.E. 2d 586 (1992). In the present case, despite the seemingly positive environmental testimony propounded by the Company, we felt that the testimony of Intervenor witness Hargett was entitled to great weight, and raised major concerns in our mind about the resultant state of the Reedy River, Lake Greenwood, Lake Conestee, and their environs if effluent is extracted from the Reedy River. At this point, we simply cannot say what would happen.

In addition, Company witness Neff noted that during typical operation, the plant will use 4.8 to 5.6 million gallons per day of process water, which will be provided by a combination of treated effluent from the Western Carolina Regional Sewer Authority (WCRSA) and potable water from the Greenville Water System. Tr., Vol. II, Neff at 470-471. Despite the Company's attempt to state in its Petition that it had decided to go with the Greenville Water System alternative, we cannot accept such a statement as a substitute for the record evidence of this case. Thus, we must assume that process water

from both sources is still an option for the Company. Accordingly, although Neff states that WCRSA has more than enough treated effluent from its Mauldin Road and Lower Reedy treatment facilities to meet Greenville County Power's needs (see Tr., Vol. II, Neff at 471), Neff makes no attempt to assess the effects of removal of the effluent on aquatic habitat of the Reedy River, Lake Greenwood, and its environs. As stated in Order No. 2002-120, and as per the testimony of witness Hargett, we believe that this analysis is of great importance to the question of environmental compatibility of the plant, and without it, we could not and cannot make the proper environmental findings.

With due deference to the Company, we have reviewed the additional testimony presented with regard to water quality matters, in addition to that given by Neff and Hargett, including that of Company witnesses Olsen, Orvin, and Fletcher, and the testimony of witnesses Turner and Sadler of DHEC. Nothing that we have reviewed changes our mind about the fact that additional studies are needed on the effects of the removal of effluent from the Reedy River. We do not dispute the fact that there may be some beneficial effects of this removal, such as reduction of certain pollutants. However, without detailed studies of the effect of the removal of effluent on the aquatic habitat of the Reedy River and its environs, we just simply cannot make the proper statutory findings as to the justifiability of the impact of the plant on the environment. None of the additional testimony sheds any light on this vital and necessary question.

Greenville County Power's second allegation of error is that this Commission's denial of the Certificate violated that Company's constitutional rights to due process and equal protection of the law. The Company states that we applied an interpretation of the

Utility Facility Siting and Environmental Protection Act (the Act) that was entirely different in this case from the interpretation we have used to evaluate other Certification applications. The Company states that we applied "a more stringent criteria" to evaluate Greenville County Power's Application than we did to evaluate the applications of Greenville Generating Company, LLC and GenPower Anderson, and therefore deprived Greenville County Power of its due process and equal protection rights. Such is not the case.

The criteria applied to all of the cases emanated from exactly the same source: the Utility Facility Siting and Environmental Protection Act, found at S.C. Code Ann. Section 58-33-10 et seq. (1976 and Supp. 2001). The criteria to be applied are found in Section 58-33-160 (1976). Examination of the Orders noted by the Company will reveal quotation of the same criteria in each of our Orders. The criterion in controversy herein is Section 58-33-160 (1)(c). This states that the Commission must find that the impact of the facility upon the environment is justified, considering the state of available technology and the nature and economics of the various alternatives and other pertinent considerations. This same criterion is mentioned in each of the Orders cited by Greenville County Power. Thus, the standard used by the Commission is exactly the same in each case.

One of the factors that prompted a different result in the present case from prior cases was the presence of additional testimony by a highly credible witness, Dr. David Hargett. Dr. Hargett clearly raised doubts about what might happen to the Reedy River if large amounts of effluent that would normally become part of the river's flow were

removed by the Greenville County Power Project. Dr. Hargett's description of the lack of a study on such matters was one of the factors that prompted our decision in the case at bar, which was that we could not state that the impact of the facility in question is justified, considering the state of available technology and the nature and economics of the various alternatives and other pertinent considerations. Again, this is taken directly from S.C. Code Ann. Section 58-33-160(1)(c), which, again, we cited in all of our merchant plant orders. It should be noted that this Commission also heard voluminous testimony from many other witnesses on the environmental factors in this case. We cannot say with any certainty what decision we might have made had some or all of this testimony been present in the other cases cited by the Company, but we must look at the evidence that we receive in the record, and make the best decision that we can, based on what is before us in that particular case, using the Utility Facility Siting and Environmental Protection Act as our guide. This is what we did in the present case, and in all the other merchant plant siting cases before us. We discern no violation of any constitutional principles of due process or equal protection. Thus, we reject this ground for rehearing or reconsideration propounded by the Company.

In further support of our rejection of this ground, we point out several other differing factors that exist between our prior applications for merchant plant certificates and Greenville County Power's application. Some of these factors show major differences between the proposals. With regard to Greenville Generating Company in Docket No. 2000-558-E, we would note that the plant proposed was a 900 MW simple cycle peaking plant composed of six units. The facility was only to be run as necessary to

meet the peak electrical loads for the region. Unlike a combined cycle plant that requires large quantities of water, a simple cycle plant has only a limited demand for water. Whereas a traditional steam plant may be expected to discharge some 1000 gallons of wastewater per minute, a simple cycle plant would discharge something on the order of 10 gallons per minute. Further, a traditional steam boiler power plant can be expected to require several million gallons of water per day to support its operations, as is true with the proposed Greenville County Power plant. By way of comparison, water demand for a combustion turbine peaking facility capable of an equivalent electrical output is on the order of 250,000 gallons per day or less. Further, the source of water for the Greenville Generating Company plant was to come completely through the Greenville Water System, versus the possible alternative sources of water from the Greenville Water System and effluent from the WCRSA seen in the present case. See Application of Greenville Generating Company, Docket No. 2000-558-E, and testimony of Rene Kirchfeld, J. Bradley Williams, and Jolecia Marigny as filed in the Greenville Generating Company docket. Accordingly, the water requirements for the Greenville Generating Company facility were much less than those seen for the Greenville County Power facility and were to come from a different source. The Commission was bound to take these differing facts into consideration when considering the Greenville County Power application.

In addition, the application by GenPower Anderson for a merchant plant differs in several respects from the application for certification filed by Greenville County Power. First, the GenPower Anderson plant was to be located in Anderson County, South

Carolina, as opposed to the Greenville County Power plant's proposed location in Greenville County. Second, the proposed plant for GenPower would produce only 640 MW, which is smaller than the proposed 810 MW to be produced by Greenville County Power. Third, although the quantity of water per day required for various processes by the GenPower plant is similar to that proposed for Greenville County Power, the source proposed for that water is different. GenPower will receive treated effluent from two nearby waste treatment facilities and will be delivered to the site via an underground water pipeline from two local wastewater treatment plants, i.e. Generostee Creek and the Rocky River Wastewater Treatment Plants. These plants are owned by the City of Anderson. The proposed source of water for Greenville County Power has been previously well described and is different from GenPower's. See Application of GenPower Anderson, Docket No. 2001-78-E. Again, such differing factors must be examined when comparing applications from different companies, along with the fact that different witnesses may well be presented in different hearings. Certainly, no due process or equal protection rights violations occurred in the Greenville County Power docket.

Third, Greenville County Power alleges that our Order is arbitrary and capricious, in that we ignored the reliable, probative, and substantive evidence in the record. Again, the Company raised the question that we just rejected above, that is that we somehow used a different standard than that we have used to evaluate other similar applications. The Company then goes on to point out that testimony in this matter took three days, was memorialized in 845 pages of transcript, and was supported by 22 exhibits. Greenville

County Power then makes the erroneous statement that nothing in this record contradicted the evidence offered by it, showing that the impact of the facility upon the environment is justified. As stated by us previously, Dr. Hargett's testimony raised serious questions about whether or not the impact of the plant on the environment was justified. Further, the Company has assumed that its testimony somehow overcame the problems pointed out by Dr. Hargett. That testimony did not. As the triers of fact in this case, and as a "jury of experts," we give whatever weight we deem appropriate to the various witnesses' testimony. Unfortunately for Greenville County Power, we gave major weight to Dr. Hargett's testimony, who convinced us that the effects of effluent removal from the Reedy River need serious consideration through study before we consider certification of this Company's plant. No Company witness disputed the fact that there was no such study available. Again, Dr. Hargett's strong environmental testimony was only presented in this Docket, and not in any of the dockets mentioned by the Company. Accordingly our decision is certainly not arbitrary and capricious, but is based on specific, probative, credible, and substantial evidence in the record of this case.

The Company comments on "the absence of a statutory or regulatory directive on the kinds of evidence required to support an application." This is not correct. The Act, S.C. Code Ann. Section 58-33-160, specifically describes each element that the Commission must find to grant the appropriate Certificate. Accordingly, the statute shows exactly what type of evidence is required to support an application. This assertion of the Company is without merit.

Next, Greenville County Power alleges that the Act requires the Commission, in determining whether the impact of the facility upon the environment is justified, to consider the state of available technology, and the nature and economics of the various alternatives and other considerations. The Company alleges that, in our original Order, we stopped with the bare conclusion that more studies were required, rather than analyzing the other evidence. Again, this assertion is without merit. Our conclusion in Order No. 2002-120 requires no further analysis. We stated the following: "We have examined the environmental evidence in this case, and must conclude that we cannot make a finding that the impact of the facility upon the environment is justified, considering the state of available technology and the nature and economics of the various alternatives and other pertinent considerations." We went on to state that despite the testimony of various Company witnesses, that we still had concerns about the effect of the proposed plant on both air and water. With regard to the water specifically, this Commission pointed out that, as several witnesses had pointed out, there have been no studies entered into the evidence in this case which assess the downstream effects of removal of effluent, and the associated flow, from the Reedy River for use in the processes of the proposed plant. Without this and associated information, we simply determined that we could not make the required statutory finding. Under this particular circumstance, no further analysis was necessary. The Company is simply incorrect in its assertion of error.

Greenville County Power also states that this Commission exceeded its statutory authority. The Company states that although we have responsibilities under the Act with

regard to environmental compatibility, that the Act does not authorize the Commission to supplant the role of other agencies with regard to air and water permitting. The Petition then goes on to somehow suggest that the Commission has attempted to supplant DHEC as the environmental authority in its holding in this case. The Company states that the record is devoid of evidence suggesting that Greenville County Power would not meet DHEC's standards for air and water emissions. The problem that we have with this assertion is that the line that the Company attempts to draw is very difficult to see. The Company admits that this Commission has responsibilities under the Act with regard to environmental compatibility. However, when this Commission attempts to exercise those responsibilities, the Company accuses us of supplanting DHEC. This we have not done. We take no issue with the fact that DHEC must eventually make a judgment on its own about the issuance of air and water permits. We take no position on whether that agency would find that the permits should be issued or not. That is up to DHEC. Once again, all this Commission has said is that we are not able to make the required finding that the impact of the project on the environment is justified, as per the statutory criteria, without first seeing the results of the discussed studies. This in no way displaces DHEC as the ultimate arbiter and/or grantor of the proper permits in the future. This assertion by the Company is certainly non-meritorious.

Further, the Company stated that, because the Commission determined that the application was deficient because certain models and studies were not presented, that the Commission exceeded its statutory authority. Greenville County Power alleges that "the models and studies that the Commission apparently found lacking were not considered

relevant by the applicant, nor had the Commission required them by regulation or order." S.C. Code Ann. Section 58-33-120 (1976) does require that an applicant file certain information with the Commission as the applicant may consider relevant, "or as the Commission may by regulation or order require." In other words the Company believes that if the Commission had wanted more studies, that it should have ordered them filed, and should not have rejected the Application for lack of said studies. The Company further reasons that something is amiss because the Commission has never ordered such studies in other merchant plant cases. Once again, Greenville County Power misses the point. David Hargett was not presented as a witness in any other case before this Commission. Hargett stated that no study had been done on the proposed plant's withdrawal of effluent from the Reedy River. The Commission found that they could not make one of their statutory findings without this information.

The Commission cannot help what is not considered relevant by the applicant in this case. The witness was a subpoenaed witness, and had not therefore prefiled written testimony and exhibits pursuant to this Commission's waiver of Commission Regulation 103-869(C)(Supp. 2001). Accordingly, since the Commission did not know what Hargett was going to say, it could not, in advance, issue a regulation or order concerning the study. The Commission certainly did not exceed its statutory authority because it found the fact that a study had not been done to be relevant to its findings in a case. This allegation is without merit.

Finally, Greenville County Power states that we erred in denying the Certificate rather than issuing a certificate conditioned on satisfaction of environmental concerns.

Again, this is non-meritorious. The Company's position is that we should have issued the Certificate conditioned upon Greenville County Power's receipt of all necessary environmental permits. In addition, the Company states that we should have required Greenville County Power to select the other alternative identified in its Application, i.e., the use of the Greenville Water System water if the Commission feared that removal of water from the Reedy River for use at the plant would cause adverse effects. Clearly, if we cannot make one of the findings required by the statute, such as the one at bar, the solution is certainly not to go ahead and issue the Certificate! We take great issue with the opposite assertion propounded by Greenville County Power. The relief to be granted under the Act is certainly within the purview of the Commission, and is to be granted only after a thorough analysis of the evidence in the case at bar. Under the present scenario, the statute does not dictate the outcome, but merely states what criteria the Commission must use in making its decision on whether or not to grant a Certificate under the circumstances of the case. Accordingly, in the present case, this Commission did not hear enough evidence to allow it to find that the impact of the plant on the environment is justified, as explained above. Under this scenario, the remedy is certainly not to grant the certificate, conditioned upon the granting of all environmental permits by DHEC. Under the statute, the Commission must make its own environmental findings, consistent with a finding of environmental compatibility, if granting a certificate. Although, as a statutory party, DHEC certainly has the right to present testimony to the Commission in this area, the Commission's decisions are not necessarily dictated by

DHEC opinions. The Commission must examine the totality of the evidence in the case before reaching its conclusions.

Nor are we mandated to dictate to the Company which method of plant cooling must be used. This is a business decision that must be made by the Company. In this case, the Company stated two possible alternatives for cooling the proposed plant, withdrawal of water from the Reedy River, and use of water from the Greenville system. What we stated in our first Order was simply that the Reedy River alternative would not suffice without further study, and that the proposal of the Reedy River alternative does not allow us to make the proper finding under the Act. Studies concerning use of water from the Greenville Water System as a viable alternative were not complete at the time of the hearing. Under the circumstances proposed by the Company's testimony, our finding on the environmental justification factor was proper.

Having fully addressed all of the allegations of the Company above, we hereby deny the Company's Petition for Rehearing or Reconsideration. At this time, we also reject DHEC's requested list of five items from Greenville County Power and future applicants. With regard to Greenville County Power, it is too late to request the items, since the record is closed, although some of the information requested is already in the record. With regard to future applicants, we reject the list at this time, however, we may reconsider this holding in the future.

This Order shall remain in full force and effect until further Order of the Commission.

BY ORDER OF THE COMMISSION:

Chairman

ATTEST:

Executive Director

(SEAL)